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There are different avenues through which the legality of Community acts can be challenged in Community courts. The EC Treaty (Rome, 1957) envisages direct and indirect means.

(1) The possibility of direct challenge is provided by Article 230 of the Treaty (action for annulment):¹

„The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-a-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.”

(2) The unlawfulness of a Community action or its implementing national measures may be invoked in legal proceedings in domestic courts of Member States. If such question is raised before domestic courts and the decision on this question is necessary to decide the case the court may (sometimes it is obliged to) request a ruling from the European Court of Justice (preliminary ruling procedure under Article 234). The Court has jurisdiction to give such preliminary ruling on the validity (and interpretation) of measures of the Community authorities and of the European Central Bank.

(3) The third method of testing the lawfulness of a general Community measure in Community courts is the plea of illegality under Article 241 of the Treaty:

„Notwithstanding the expiry of the period laid down in the fifth paragraph of Article 230, any party may, in proceedings in which a regulation adopted jointly by the European Parliament and the Council, or a regulation of the Council, of the Commission, or of the ECB is at issue, plead the grounds specified in the second paragraph of Article 230 in order to invoke before the Court of Justice the inapplicability of that regulation.”

This provision provides opportunity for the applicant to challenge the lawfulness of a regulation (or other general norm) in proceedings which have been initiated for other reasons.

(4) Though they are envisaged to ensure methods of calling into question the lawfulness of different Community measures, these procedures differ from each other in nature, scope and consequences. Even the relationship of these three procedural institutions is not clear in some aspects. However, intricacies of this problem need not be explored here, because the topic of this work is only to examine the grounds on which a Community measure may prove to be unlawful.

¹ As amended by the Treaty of Nice (Nice, 2001).

Only Article 230 of the EC Treaty sets out expressly the grounds of invalidity. Four such grounds are specified by this provision: lack of competence, misuse of powers, infringement of the treaty or any rule of law relating to its application, infringement of an essential procedural requirement. Previously, there was a debate centered on the question whether Article 234 also entails exactly these grounds or there is in this respect some difference between the two procedures. The European Court of Justice has bridged the conceptual gap between Articles 230 and 234 and it has not attached too much importance to the textual difference of the two provisions.² So, the Court identified „legality” (Article 230) with „validity” (Article 234), and in the *NV Internationale Crediet* case it (in its own motion) examined various grounds and appeared not to see from this point of view any difference between an action for annulment and the preliminary ruling procedure.³ Moreover, the Court's holding in the *International Fruit Company* case – in the context of a preliminary ruling procedure – stated that the Court's jurisdiction was not limited by the grounds on which a Community measure may be contested and the Court's competence extends to any ground which is capable of invalidating the measure in question.⁴

In what follows I consider the reasons on the basis of which the possibility of unlawfulness may arise.

1. Infringement of an essential procedural requirement

In adopting a measure the legislative body might infringe procedural requirements which are imposed on it by Community law. Such an infringement may establish the invalidity of the adopted measure. However, the defect must be connected to a requirement which qualifies as essential. It follows that the most important issue in applying this ground of invalidity is what are the essential requirements. The answer to this question can only be found in the case-law of Community courts.

In analysing these requirements it must be taken into attention that Community acts or measures do not cover only general, „normative” ones that „determine in advance and objectively the rights and obligations,”⁵ like regulations and directives under Article 249 (2) and (3) of the EC Treaty. There are legal acts addressed to one person or a narrow group of persons, which are often measures of administrative nature disposing of past questions like many decisions under Article 249 (4) of the EC Treaty.

The inherent legal differences between these two types of Community measures have an effect on the frequency by which the various grounds of invalidity appear in courts. In the process of adopting individualized decisions of administrative nature (eg. in competition, customs cases) the interested person or addressee has a better look at the procedure and is more aware of the procedural requirements. In the case of general legislative norms (regulations, directives) it is hard for a prospective applicant to get an

² SMIT, H. – HERZOG, P.: *The Law of the European Community*. New York 1999, p. 463.

³ 73-74/63. *NV Internationale Crediet- en Handelsvereniging „Rotterdam” and De Coöperatieve Suikerfabriek en Raffinaderij G.A. „Puttershoek” v Netherlands Minister of Agriculture and Fisheries*. [1964] ECR 0003.

⁴ 21-24/72. *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*. [1972] ECR 1219, paras. 5-6.

⁵ 92/78. *SpA Simmenthal v Commission*. [1979] ECR 0777, par. 38.

insight of the legislative process and of its requirements. Consequently, the question of breach of essential procedural requirements emerges more often in relation to individualized decisions.

In view of the Community courts the following failures may result in breach of an essential procedural requirement.

1.1 Breach of the duty to consult in the legislative process

Consultation is a component of the Communities' institutional balance because this procedure makes it possible for the Parliament or any other institutions to take part in the legislative process. That is why consultation constitutes an essential procedural requirement. Infringement of this obligation renders the contested measure void.⁶ The obligation to consult is in connection mainly with the role of the European Parliament in the general legislative process. There are, however, many other, narrower legislative fields where other institutions must be consulted eg. Economic and Social Committee, Court of Auditors, or various other committees,⁷ or even such obligation may be owed under the Court's case law to individuals⁸ or Member States.⁹

The issue of infringement of the obligation to consult has been raised in the following situations.

(1) There has not been consultation at all.¹⁰

(2) The Parliament has been consulted, but the content of the adopted measure was different from that of the proposal the Parliament had expressed its opinion about.¹¹

The Court has developed a test in its case law on the basis of which it can be assessed whether the alteration of the text after the consultation process renders the act void or not. According to the Court, in the following cases the amendment of the text does not require the Council or other obligee to submit the proposal to the Parliament or other institution concerned and the alteration would not make the measure invalid:¹²

⁶ 817/79. *Roger Buyl and others v Commission*. [1982] ECR 0245. par. 16.

⁷ Eg. 164/80. *Luigi De Pascale v Commission*. [1982] ECR 0909. par. 13., 817/79. *Roger Buyl and others v Commission*. [1982] ECR 0245. par. 14., 1253/79. *Dino Battaglia v Commission*. [1982] ECR 0297. paras. 15, 28., 276/80. *Ferrera Padana SpA v Commission*. [1982] ECR 0517. par. 3., 263/83. *Mariette Turner v Commission*. [1985] ECR 0893. par. 17., 281, 283, 284, 285 and 287/85. *Germany and others v Commission*. [1987] ECR 3203. par. 37., T-19/91. *Société d'Hygiène Dermatologique de Vichy v Commission*. [1992] ECR 0415. par. 31., T-69/89. *Radio Telefís Éireann v Commission*. [1991] ECR II-0485. par. 27., C-84/94. *United Kingdom v Council*. [1996] ECR I-5755. par. 41.

⁸ See eg. T-290/94. *Kaysersberg SA v Commission*. [1997] ECR II-2137. par. 105. (competition)

⁹ T-432-434/93. *Sociedade de Curtumes a Sul do Tejo Lda (Socurte), Revestimentos de Cortiça Lda (Quavi) and Sociedade Transformadora de Carnes Lda (Stec) v Commission*. [1995] ECR II-0503. par. 65.

¹⁰ 263/83. *Mariette Turner v Commission*. [1985] ECR 0893. par. 21., C-388/92. *European Parliament v Council*. [1994] ECR I-2067. par. 19., C-21/94. *European Parliament v Council*. [1995] ECR I-1827. par. 28. and C-392/95. *European Parliament v Council*. [1997] ECR I-3213. par. 24.

¹¹ See eg. 41/69. *ACF Chemiefarma NV v Commission*. [1970] ECR 0661. paras. 177–178. 164/80. *Luigi De Pascale v Commission*. [1982] ECR 0909. par. 13., 114/81. *Tunnel Refineries Limited v Council*. [1982] ECR 3249. par. 18.

¹² See eg. 20/85. *Mario Roviello v Landesversicherungsanstalt Schwaben*. [1988] ECR 2805. per AG Mancini par. 7.

- if the adopted version does not depart substantially from the previous version submitted to the Parliament,¹³
- if the alteration of the text is of „technical” nature,¹⁴
- or the amendment corresponds to the wish of the Parliament.¹⁵

(3) The circumstances of the consultation process deprive it of its purpose

This is only a hypothetical form of the infringement in the case law. Eg. in the Court's opinion the fact that the act was adopted the day after the Parliament gave its opinion does not count as disregarding the duty to consult on the part of the Council.¹⁶

1.2 Breach of the duty to give reasons

The duty to provide reasons is an essential procedural requirement.¹⁷ Article 253 of the EC Treaty provides for this obligation in general, but its precise content remains somewhat obscure:

„Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to the Treaty.”

This duty on a general level resists every analysis because it depends on the legislative context and situation. In what follows I try to advance those general statements that the Court has made in connection with this procedural requirement. It may give direction in the prospective cases.

(1) The legal acts in the Community govern lots of very different situations, relationships. These acts differ from each other in their dogmatical features, functions and purposes. So no general rules can be set up regarding the extent or the depth of the reasoning. Sometimes it is not simple to form an opinion of the observance of this obligation. The Council or the Commission adopting a measure may have wide discretionary powers. Some measures may require careful, detailed reasoning extending to all logical steps built on facts and law. In another case a summary, brief reasoning is sufficient. The Court has accordingly concluded on many occasions that the duty to give reasons turns wholly upon the factual context and legal characteristics of the measure in issue.¹⁸ Because of this relativity it is hard to give a coherent account of the question.

¹³ 41/69. ACF Chemiefarma NV v Commission. [1970] ECR 0661. par. 178., C-65/90. European Parliament v Council. [1992] ECR I-4593. par. 16., C-388/92. European Parliament v Council. [1994] ECR I-2067. par. 10.

¹⁴ 81/79. Roger Buyl and others v Commission. [1982] ECR 0245. par. 23., 1253/79. Dino Battaglia v Commission. [1982] ECR 0297. par. 24.

¹⁵ 81/79. Roger Buyl and others v Commission. [1982] ECR 0245. par. 23., 1253/79. Dino Battaglia v Commission. [1982] ECR 0297. par. 24., C-65/90. European Parliament v Council. [1992] ECR I-4593. par. 16., C-388/92. European Parliament v Council. [1994] ECR I-2067. par. 10.

¹⁶ 114/81. Tunnel Refineries Limited v Council [1982] ECR 3249. par. 18.

¹⁷ Eg. T-84/96. Cipeke – Comércio e Indústria de Papel Ld. v Commission. [1997] ECR II-2081. par. 47., 327/85. The Netherlands v Commission. [1988] ECR 1065. par. 13., 68/86. United Kingdom v Council. [1988] ECR 0855. paras. 26-36., T-1/90 Pérez-Múñez Casariego v Commission [1991] ECR II-0143. par. 73., T-167/94. Detlef Noelle v Council and Commission. [1995] ECR II-2589. par. 73.

¹⁸ 13/72. The Netherlands v Commission. [1973] ECR 0027. par. 11., 69/83. Charles Lux v Court of Auditors. [1984] ECR 2447. par. 36., 327/85. The Netherlands v Commission. [1988] ECR 1065. par. 13.,

(2) The Court pointed out that the absence or inadequacy of a statement of reasons leads to the failure of complying with this obligation. (However, this defect is distinct from the one when the grounds of the contested decision are incorrect, which can be raised in the context of the problem whether a decision is well founded or not).¹⁹ The statement of reasons must disclose in a clear manner the reasoning in such a way as to make the persons concerned aware of the true causes and motives for the measure and thus enable them to defend their rights.²⁰

The measure must contain reasons that are capable of justifying the conclusion. Otherwise it may be impossible for the addressee to make certain whether the measure is rendered invalid by an error of appraisal.²¹

In respect of inadequate or too general statements of reasons one of the most illuminating passages of the case law is the following:

„In imposing upon the Commission the obligation to state reasons for its decisions, Article 190 is not taking mere formal considerations into account but seeks to give an opportunity to the parties of defending their rights, to the Court of exercising its supervisory functions and to member States and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty. To attain these objectives, it is sufficient for the decision to set out, in a concise but clear and relevant manner, the principal issues of law and of fact upon which it is based and which are necessary in order that the reasoning which has led the Commission to its decision may be understood. Apart from general considerations, which apply without distinction to other cases, or which are confined to repeating the wording of the Treaty, the Commission has been content to rely upon „the information collected”, without specifying any of it, in order to reach a conclusion „that the production of the wines in question is amply sufficient”.²²

(3) Under this holding, in assessing the observance of the duty to state reasons there is another aspect that may play an important part. One of the objectives of this obligation is to ensure the opportunity to the persons concerned of defending their rights and to the Court to supervise the decision leading to the measure. The Court followed this reasoning in a series of cases.²³ Consequently, if the reasoning of the legislative body meets those requirements, the duty to give reasons is observed.

238/86. The Netherlands v Commission [1988] ECR I 191, par. 15., 102/87. France v Commission. [1988] ECR 4067, par. 33., T-16/91 RV. Rendo NV, Centraal Overijsselse Nutsbedrijven NV and Regionaal Energiebedrijf Salland NV v Commission. [1996] ECR II-1827, par. 44.

¹⁹ T-84/96. Cipeke – Comércio e Indústria de Papel Ld. v Commission. [1997] ECR II-2081, par. 47.

²⁰ 110/81. SA Roquette Frères v Council. [1982] ECR 3159, par. 24., T-382/94. Confederazione Generale dell' Industria Italiana (Confindustria) and Aldo Romoli v Council. [1996] ECR II-0519, par. 49., C-269/90. Technische Universität München v Hauptzollamt München-Mitte. [1991] ECR I-5469, par. 26.

²¹ C-269/90. Technische Universität München v Hauptzollamt München-Mitte. [1991] ECR I-5469, par. 27.

²² 24/62. Germany v Commission. [1963] ECR 0131.

²³ 24/62. Germany v Commission. [1963] ECR 0131., 275/80 and 24/81. Krupp Stahl AG v Commission. [1981] ECR 2489, paras. 6. and 13., 110/81. SA Roquette Frères v Council. [1982] ECR 3159, par. 24., 69/83. Charles Lux v Court of Auditors. [1984] ECR 2447, par. 36., 102/87. France v Commission. [1988] ECR 4067, par. 33., T-16/91 RV. Rendo NV, Centraal Overijsselse Nutsbedrijven NV and Regionaal Energiebedrijf Salland NV v Commission. [1996] ECR II-1827, par. 44., T-44/90. La Cinq SA v Commission. [1992] ECR II-0001, par. 42., T-459/93. Siemens SA v Commission. [1995] ECR II-1675, par. 31., T-382/94. Confederazione Generale dell' Industria Italiana (Confindustria) and Aldo Romoli v Council.

(4) Separate problems emerge in regard to those measures that are adopted by a Community institution exercising wide discretionary powers in the matter. Here, the conditions of the decision-making are less limited. The Court is of the view that in these cases the legislative body has to meet higher standards in giving grounds for the measure. It shall examine closely, carefully and impartially every aspect of the matter. Only a sufficiently precise and clear statement of reasons may present an opportunity to the Court for exercising its supervisory duty. Too general or oblique reasoning prevents the Court from reviewing and assessing whether all requirements in the decision-making have been met.²⁴ Accordingly, if the Commission has wide power in assessing complex economic situations, it has the obligation not only to indicate the economic factors determining the state of the market that influenced its decision but also to touch upon the effects of these factors.²⁵

There are some considerations advanced by the Court that may influence the assessment whether the legislative body has complied with the requirement to state reasons. These are the following.

(5) Those persons who are concerned by a decision may be expected to make efforts to interpret the statement of reasons if the meaning of the text is not immediately unequivocal. The measure is not rendered invalid by unclear reasoning if the ambiguities in the text can be dissolved by means of proper interpretation.²⁶

(6) The statement of reasons of a Community act must be self-sufficient. The grounds on which it is based may not be made up by written or oral explanations in the proceedings before the Court.²⁷

(7) The decision concerning appointments by the Council of members delegated by the Member States of a Community body meets the requirement of giving sufficient reasons if it lists the names of the appointed persons and indicates the office or function they hold and sets out the considerations in the preamble of these appointments.²⁸

(8) If the applicant has taken part in the decision-making process and has been heard as an interested party and has been informed in a separate letter of the various factors that have subsequently led to the decision the Commission observes its duty to give reasons even if the decision contains only a concise statement of grounds.²⁹

[1996] ECR II-0519, par. 49., C-269/90. Technische Universität München v Hauptzollamt München-Mitte. [1991] ECR I-5469, par. 26.

²⁴ T-371/94 and T-394/94. British Airways plc, Scandinavian Airlines System Denmark-Norway-Sweden, Koninklijke Luchtvaart Maatschappij NV, Air UK Ltd, Euralair international, TAT European Airlines SA and British Midland Airways Ltd v Commission. [1998] ECR II-2405, paras. 95-96., C-269/90. Technische Universität München v Hauptzollamt München-Mitte. [1991] ECR I-5469, par. 28.

²⁵ C-358/90. Compagnia Italiana Alcool Sas di Mario Mariano & Co. v Commission. [1992] ECR I-2457, par. 42.

²⁶ T-16/91 RV. Rendo NV, Centraal Overijsselse Nutsbedrijven NV and Regionaal Energiebedrijf Salland NV v Commission. [1996] ECR II-1827, par. 46.

²⁷ T-61/89 Dansk Pelsdyravlerforening v Commission. [1992] ECR II-1931, par. 131.

T-16/91 RV. Rendo NV, Centraal Overijsselse Nutsbedrijven NV and Regionaal Energiebedrijf Salland NV v Commission. [1996] ECR II-1827, par. 45.

²⁸ T-382/94. Confederazione Generale dell' Industria Italiana (Confindustria) and Aldo Romoli v Council. [1996] ECR II-0519, par. 50.

²⁹ 1252/79. SpA Acciaierie e Ferriere Lucchini v Commission. [1980] ECR 3753, par. 14.

1.3 Failure to hear the party concerned

The Court pointed out in many cases that it is essential procedural requirement to ensure the right of the person concerned to make his views known. The Court found that it is

„...general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known. This rule requires that an undertaking be clearly informed, in good time, of the essence of the conditions to which the Commission intends to subject an exemption and it must have the opportunity to submit its observations to the Commission. This is especially so in the case of conditions which, as in this case, impose considerable obligations having far-reaching effects.”³⁰

This right of the interested party to be heard is a fundamental principle of Community law and it must be ensured even in the absence of any rules governing the proceedings in question.³¹

The failure of observing the right to be heard on the part of a Community authority may result in annulling the contested measure or in declaring it invalid.³² This right may not be invoked in the case of the general, „normative” acts. In the administrative procedures leading to decisions, administrative measures (eg. in the fields of competition, customs, anti-dumping law, state aids), however, the observance of this requirement will be essential for the proper administration of matters. The right to be heard may in some cases fit into the more general rights of defence as witnessed by some cases in Luxembourg.³³

Not only the addressees of the measure or the persons directly concerned may be entitled to be heard. If there are third parties who can show sufficient interest (eg. they are exposed to the incidental effects of the decision) the right to be heard may emerge in their respect. However, the rights of third parties in the administrative procedure are not as extensive as the rights ensured to the addressees of the measure or to directly interested persons. For example, if the Commission by its decision reduces assistance previously granted to the applicant from the European Social Fund, the interested Member State

³⁰ 17/74. *Transocean Marine Paint Association v Commission*. [1974] ECR 1063. par. 15., see also T-346/94. *France-Aviation Sa v Commission*. [1995] ECR II-2841. par. 29., T-167/94. *Detlef Noelle v Council and Commission*. [1995] ECR II-2589. par. 73., C-135/92. *Fiskano AB v Commission*. [1994] ECR I-2885. paras. 41-42.

³¹ C-32/95 P. *Commission v Lisrestal – Organização Gestao de Restaurantes Colectivos Lda, Gabinete Técnico de Informatica Lda (GTI), Lisnco – Serviço Marítimo Internacional Lda, Rebocalis – Rebocagem e Assistancia Marítima Lda and Gaslimpo – Sociedade de Desgasificação de Navios SA*. [1996] ECR I-5373. paras. 21., 30., T-218/95. *Azienda Agricola „Le Canne” Srl v Commission*. [1997] ECR II-2055. par. 48.

³² Eg. 17/74. *Transocean Marine Paint Association v Commission*. [1974] ECR 1063., C-135/92. *Fiskano AB v Commission*. [1994] ECR I-2885. par. 44., C-32/95 P. *Commission v Lisrestal – Organização Gestao de Restaurantes Colectivos Lda, Gabinete Técnico de Informatica Lda (GTI), Lisnco – Serviço Marítimo Internacional Lda, Rebocalis – Rebocagem e Assistancia Marítima Lda and Gaslimpo – Sociedade de Desgasificação de Navios SA*. [1996] ECR I-5373. par. 44.

³³ Eg. 322/81. *NV Nederlandsche Banden Industrie Michelin v Commission*. [1983] ECR 3461. par. 7., T-7/89. *SA Hercules Chemicals NV v Commission*. [1991] ECR II-1711. par. 51., T-290/94. *Kaysersberg SA v Commission* [1997] ECR II-2137. par. 105.

must be heard because of the responsibilities it assumes in the whole system of assistance.³⁴

1.4. Failure of authenticating of Commission's acts

The Commission has a duty to produce an authenticated text of all the acts it has adopted. In the process of authentication the act in question is authenticated in the languages in which it is binding by the signatures of the President and the Executive Secretary of the Commission.

This process is provided to guarantee certainty as to the text and its translation. Authentication of acts is an essential procedural requirement under Article 230 of the EC Treaty and the failure to fulfil this obligation may give rise to an action for annulment. Some measures were annulled by the Court by reason of infringement by the Commission of this procedural requirement.³⁵

1.5. Infringement of procedural conditions prescribed for adopting a measure

The Council may adopt acts in urgent matters by written procedure. Under the Rules of Procedure the Council may resort to written voting only if all the members of the Council agree to that. This requirement applies even if the measure in issue may be adopted by a majority vote.

The Council adopted Council Directive 85/649/EEC of 31 december 1985 prohibiting the use in livestock farming of certain substances having a hormonal action. This measure was adopted by way of written procedure. United Kingdom and Denmark opposed the use of the written procedure and the directive itself as well. The Council nevertheless adopted the act by vote of the majority. In a Article 230 action the Court pointed out that this counts as breach of essential procedural requirement and declared the act void.³⁶

1.6. Breach of purely internal procedural rule in consultation

Under a Council regulation in competition cases the Commission must consult an Advisory Committee on Restrictive Practices and Monopolies. In this process the Commission must provide the Committee with all the necessary documents (eg. a preliminary draft decision, a summary, minutes of the hearing of the interested parties). Lots of measures have been challenged on the basis of alleged irregularities in respect of this consultation process.

³⁴ C-291/89. *Interhotel, Sociedade Internacional de Hoteis SARL v Commission*. [1991] ECR I-2257. par. 17., T-450/93. *Lisrestal – Organização Gestao de Restaurantes Colectivos Lda and others v Commission* [1994] ECR II-1177. par. 46., C-157/90 *Infotec – Projectos e Consultadoria Lda v Commission* [1992] ECR I-3525. par. 20., C-199/91 *Foyer culturel du Sart-Tilman ASBL v Commission* [1993] ECR I-2667. par. 34., C-334/91. *Innovation et Reconversion Industrielle ASBL v Commission*. [1993] ECR I-2851. par. 25.

³⁵ T-37/91. *Imperial Chemical Industries Plc v Commission*. [1995] ECR II-1901. par. 93., C-137/92 P. *Commission v BASF AG, Limburgse Vinyl Maatschappij NV, DSM NV, DSM Kunststoffen BV, Hüls AG, Elf Atochem SA, Société Artandienne de Vinyle SA, Wacker Chemie GmbH, Enichem SpA, Hoechst AG, Imperial Chemical Industries plc, Shell International Chemical Company Ltd and Montedison SpA*. [1994] ECR I-2555. par. 76.

³⁶ 68/86. *United Kingdom v Council*. [1988] ECR 0855. par. 49.

However, the Court has consistently held that „a failure to comply with an internal procedural rule does not render the final decision unlawful unless it is sufficiently substantial and had a harmful effect on the legal and factual situation of the party alleging a procedural irregularity.”³⁷ It has not qualified as substantial irregularity or harmful effect when

- a period of 14 days had not elapsed between the dispatch of the notice convening the Advisory Committee and the holding of the joint meeting, though the procedural rules stipulated so,³⁸
- the Committee had not been given the minutes of the hearing containing the position of the interested parties,³⁹
- the minutes of the hearing exposing the position of the interested parties had been dispatched to the Committee past deadline, or the decision had been adopted on the basis of the provisional minutes of the hearing exposing the position of the interested parties and in drawing up the minutes of the hearing the party's motion for amendment had been rejected.⁴⁰

2. *Infringement of the treaty or any rule of law relating to its application*

This is the most frequently invoked ground of invalidity, which may comprehend other grounds. Eg. lack of competence as ground of invalidity can be explained from another aspect in such a way that the contested measure or a provision of the contested measure contradicts the EC Treaty that does not give power to the legislative body to adopt it.

Under this ground of invalidity a Community measure can be void by reason of the conflicts of norms. The provisions of primary norms provide the basis, the framework and the bounds of the implementing secondary norms⁴¹ and as such they are hierarchically on a higher level. The primary norms comprise eg. the three original treaties concluded by six Member States, its amending and supplementing treaties, accession treaties, and the budgetary treaties⁴² and protocols and supplements of these instruments.⁴³ Every Community norm that does not qualify as primary norm belongs to the secondary norms. These secondary norms or measures may not be in conflict with

³⁷ T-69/89. *Radio Telefis Eireann v Commission*. [1991] ECR II-0485. par. 27.

³⁸ T-69/89. *Radio Telefis Eireann v Commission*. [1991] ECR II-0485. par. 27.

³⁹ T-69/89. *Radio Telefis Eireann v Commission*. [1991] ECR II-0485. par. 25.

⁴⁰ 48/69 *Imperial Chemical Industries Ltd. v Commission*. [1972] ECR 619, paras. 30-32., 51/69 *Farbenfabriken Bayer AG v Commission* [1972] ECR 745, paras. 16-17., T-69/89. *Radio Telefis Eireann v Commission*. [1991] ECR II-0485. par. 25., 44/69 *Buchler and Co. v Commission* [1970] ECR 733. paras. 16-17.

⁴¹ 100/63. *J.G. van der Veen, J. widow of Kalsbeek v Bestuur der Sociale Verzekeringsbank and 'nine other affairs*. [1964] ECR 1105., 4/66. *J.E. Labots (née Hagenbeek) v Raad van Arbeid, Arnhem*. [1966] ECR 0617., 34/69. *Caisse d'assurance vieillesse des travailleurs salariés de Paris v Jeanne Duffy*. [1969] ECR 0597. par. 6., 26/78. *Institut national d'assurance maladie-invalidité and Union nationale des fédérations mutualistes neutres v Antonio Viola*. [1978] ECR 1771. par. 9., 191/73. *Rudolf Niemann v Bundesversicherungsanstalt für Angestellte*. [1974] ECR 0571. par. 5., 20/75. *Gaetano d'Amico v Landesversicherungsanstalt Rheinland-Pfalz*. [1975] ECR 0891. par. 10., 279/82. *Leo Jerzak v Bundesknappschaft – Verwaltungsstelle Aachen*. [1983] ECR 2603. par. 10.

⁴² See CRAIG, P. – DE BÚRCA: G.: *EU Law*. Oxford 1998. p. 504.

⁴³ See ISAAC, G.: *Droit communautaire général*. Paris, 1996. p. 249., VÁRNAY E. – PAPP M.: *Az Európai Unió joga*. Budapest, 2002. p. 145-146.

primary norms and may not go beyond the framework set by the primary norm. If such conflicts exist between primary and secondary norms this latter can be annulled or declared void.

(1) The secondary Community measures may not be in conflict not only with the provisions of the founding treaties, but also with their objectives or purposes. This position was articulated in the *Bela-Mühlen* case, where the Court annulled the Council Regulation 563/76/EEC of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feeding-stuff. The main reason of this holding was that the regulation in issue could not be justified for the purposes of attaining the objectives of the common agricultural policy.⁴⁴

(2) The EC Treaty expressly stipulates that a Community measure may contradict neither another norm that implements the founding treaty. The problem is to identify those norms that implement the founding treaties or relate to their application. Some scholarly writings claim that these measures cover all rules of Community law other than those which exist in the treaties themselves.⁴⁵ This approach does not seem to work because in this case there are no measures left which could be in conflict with these norms. The other solution is to distinguish norms which are directly based on the provisions of the treaties from norms which are directly based on provisions of some secondary act. The rules based on the treaties are more general ones, while the legal acts based on secondary norms are more specified measures that implement those more general secondary norms constituting their basis. This has been put in another distinction, the one between basic norm and implementing norm.

(3) A great part of the secondary measures implement other secondary acts in the Community legal system or is based upon them. The question is whether this fact generates any hierarchy among these secondary acts or not. The Court seemed to answer in the positive to this question.⁴⁶ Accordingly, a Council regulation may not be contradicted by its implementing measure adopted by the Commission.⁴⁷ Moreover, not only its provisions may not be contradicted, but the implementing measure may not jeopardize its objectives, because this situation also provides basis for finding a measure unlawful.⁴⁸ Advocate General *Lord Slynn* shared similar position in one of his opinion.⁴⁹

The duality of basic rule and its implementing rule appeared quite early in the *Köster* case and run through the jurisprudence of the Court. In this case the Court concluded:

„Both the legislative scheme of the Treaty, reflected in particular by the last indent of Article [211], and the consistent practice of the Community institutions establish a distinction, according to the legal concepts recognized in all Member States,

⁴⁴ 114/76. *Bela-Mühle Josef Bergmann KG v Grows-Farm GmbH & CO. KG*. [1977] ECR 1211. paras. 7-8.

⁴⁵ CRAIG, P. – DE BÚRCA, G.: *EU Law*. Oxford 1998. p. 504.

⁴⁶ T-244/94. *Wirtschaftsvereinigung Stahl, Thyssen Stahl AG, Preussag Stahl AG and Hoogovens Groep BV v Commission*. [1997] ECR II-196. par. 28.

⁴⁷ C-152/88. *Sofrimport SARL v Commission*. [1990] ECR I-2477. paras. 20-21., 192/83. *Greece v Commission*. [1985] ECR 2791. paras. 34-35., 113/77. *NTN Toyo Bearing Company Ltd and others v Council*. [1979] ECR 1185.

⁴⁸ 192/83. *Greece v Commission*. [1985] ECR 2791. par. 34.

⁴⁹ 181/85. *France v Commission*. [1987] ECR 0689. per AG Slynn.

between the measures directly based on the Treaty itself and derived law intended to ensure their implementation."⁵⁰

This holds true also of decisions and an implementing decision may not be in conflict with the general decision (basic decision),⁵¹ or of those cases when the same authority (Council) adopts both the basic norm and implementing norm.⁵² However, sometimes it is hard to tell in practice that a measure is based on a provision of the Treaty or rather on another secondary rule.⁵³

(4) A secondary measure may not be inconsistent with the general principles of law recognized in the Community law. As these principles constitutes part of and is derived from the basis of Community legal system and the common legal heritage of the Member States their infringement counts as infringement of the treaty or any rule of law relating to its application.⁵⁴ In this sense these general principles of law are on the level of primary norms.⁵⁵

The most frequently invoked general principles are the following: proportionality,⁵⁶ equality,⁵⁷ legal certainty,⁵⁸ right to defence,⁵⁹ observance of fundamental rights.⁶⁰

(5) International conventions by which the Community is bound constitute part of the Community legal system.⁶¹ The authorities have power on the basis of the provisions of

⁵⁰ 25/70. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster et Berodt & Co. Kg.* [1970] ECR 1161. par. 6., and see also 30/70. *Otto Scheer v Einfuhr- und Vorratsstelle für Getreide und Futtermittel.* [1970] ECR 1197. par. 15.

⁵¹ See 32-33/58. *Société nouvelle des usines de Pontlieue – Acières du Temple (S.N.U.P.A.T.) v High Authority.* [1959] ECR 0275., T-244/94. *Wirtschaftsvereinigung Stahl, Thyssen Stahl AG, Preussag Stahl AG and Hoogovens Groep BV v Commission* [1997] ECR II-1963. par. 36.

⁵² 113/77. *NTN Toyo Bearing Company Ltd and others v Council.* [1979] ECR 1185. par. 21.

⁵³ T-244/94. *Wirtschaftsvereinigung Stahl, Thyssen Stahl AG, Preussag Stahl AG and Hoogovens Groep BV v Commission* [1997] ECR II-1963. paras. 43-44.

⁵⁴ 112/77. *August Töpfer & Co. GmbH v Commission.* [1978] ECR 1019. par. 19., and see eg. C-27/95. *Woodspring District Council v Bakers of Nailsea Ltd.* [1997] ECR 1847. par. 17.

⁵⁵ SHAW, J.: *Law of the European Union.* Basingstoke 2000. p. 241-242.

⁵⁶ C-331/88. *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others.* [1990] ECR I-4023. par. 13., and eg. C-27/95. *Woodspring District Council v Bakers of Nailsea Ltd.* [1997] ECR 1847. par. 17., 114/76. *Bela-Mühle Josef Bergmann KG v Grows-Farm GmbH & CO. KG.* [1977] ECR 1211., 143/82. *David Lipman v Commission.* [1983] ECR 1301. paras. 14-15.

⁵⁷ 117/76. and 16/77. *Albert Ruckdeschel & Co. et Hansa-Lagerhaus Ströh & Co. Contre. Hauptzollamt Hamburg-St. Annen; Diamalt AG v Hauptzollamt Itzehoe.* [1977] ECR 1753. par. 7., 143/82. *David Lipman v Commission.* [1983] ECR 1301. paras. 12-13., C-27/95. *Woodspring District Council v Bakers of Nailsea Ltd.* [1997] ECR 1847. par. 17.

⁵⁸ 13/61. *Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn.* [1962] ECR 0089. par. 6., C-331/88. *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others.* [1990] ECR I-4023. paras. 46-47.

⁵⁹ C-32/95 P. *Commission v Lisrestal – Organização Gestao de Restaurantes Colectivos Lda, Gabinete Técnico de Informatica Lda (GTI), Lisnico – Serviço Marítimo Internacional Lda, Rebocalis – Rebocagem e Assistancia Marítima Lda and Gaslimpo – Sociedade de Desgasificação de Navios SA.* [1996] ECR I-5373. par. 45., 319/85. *Rudolf Misset v Council.* [1988] ECR 1861. paras. 8-9.

⁶⁰ 25/70. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster et Berodt & Co. Kg.* [1970] ECR 1161. par. 22., 4/73. *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission.* [1974] ECR 0491. par. 13., 41/79, 121/79 and 796/79. *Vittorio Testa, Salvino Maggio and Carmine Vitale v Bundesanstalt für Arbeit.* [1980] ECR 1979. par. 18.

⁶¹ SHAW, J.: *Law of the European Union.* Basingstoke 2000. p. 241-242.

the founding treaties to conclude such international conventions. These conventions may not contravene the primary norms of the Community. Though these conventions are derived from the founding treaties, they are superior to other, ordinary secondary rules adopted by the Community authorities. This point follows from Article 300 (7) of the EC Treaty which stipulates that the Community institutions are bound by these agreements. This provision entails the duty of the Community authorities not to adopt such measures as contravene these international agreements.⁶² Though the EURATOM Treaty does not include such provision the same rule applies also to this other Community.⁶³

The Court declared in its *International Fruit Company* holding that a provision of international law can affect the validity of a Community measure if two conditions are met.⁶⁴

Firstly, the Community must be bound by the provision of international law in question.⁶⁵ Secondly, that provision must be capable of conferring rights on citizens of the Community which they can invoke before the courts.⁶⁶ It seems that the second condition should not be met if someone invokes claims of invalidity in direct action under Article 230 or 241 of the Treaty, though the Court's position is not too clear in this respect.⁶⁷

In this paper I cannot touch upon those separate problems that emerge when a Member State conclude agreements other Member States⁶⁸ or third States.⁶⁹

3. Lack of competence

This ground points to the absence of authorization to adopt a measure. If the institution has not legislative power to adopt a measure stemming from a higher legal rule it will be declared to be void or annulled by the Court for lack of competence.

⁶² C-69/89. *Nakajima All Precision Co. Ltd v Council* [1991] ECR I-2069. par. 31., 104/81. *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* [1982] ECR 3641. paras. 11-14.

⁶³ LASOK, K.P.E.: *Law and Institutions of the European Union*. 2001. p. 93.

⁶⁴ 21-24/72. *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*. [1972] ECR 1219. par. 7.

⁶⁵ 21-24/72. *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*. [1972] ECR 1219. par. 7., 9/73. *Carl Schlüter v Hauptzollamt Lörrach*. [1973] ECR 1135. par. 27.

⁶⁶ 21-24/72. *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*. [1972] ECR 1219. par. 8., 9/73. *Carl Schlüter v Hauptzollamt Lörrach*. [1973] ECR 1135. par. 27., 266/81. *Società Italiana per l'Oleodotto Transalpino (SIOT) v Ministero italiano delle finanze, Ministero della Marina Mercantile, Circonscrizione doganale di Trieste and Ente Autonomo del Porto di Trieste*. [1983] ECR 0731. par. 28., or from other aspect 104/81. *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.* [1982] ECR 3641. par. 27.

⁶⁷ C-69/89. *Nakajima All Precision Co. Ltd v Council* [1991] ECR I-2069. par. 28., but see C-280/93. *Germany v Council*. [1994] ECR I-4973. paras. 110-111.

⁶⁸ 121/85. *Conegate Limited v HM Customs & Excise*. [1986] ECR 1007. especially par. 25., 286/86. *Ministere public v Gérard Deserbais*. [1988] ECR 4907. especially par. 18.

⁶⁹ C-324/93. *The Queen v Secretary of State for Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd*. [1995] ECR I-0563. especially paras. 27-28., C-124/95. *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England*. [1997] ECR I-0081. especially paras. 56-57., T.364-365/95. *T. Port GmbH & Co. v Hauptzollamt Hamburg-Jonas*. [1998] ECR I-1023. especially par. 61., 812/79. *Attorney General v Juan C. Burgoa*. [1980] ECR 2787. especially paras. 23-25.

The plea based on lack of competence is rarely successful. According to *Craig and Burca* there are two reasons for this fact.⁷⁰ The EC Treaty has provisions which confer quite broad legislative power on the institutions. Article 94 and 308 of the Treaty may be mentioned in this respect. Article 94 provides that the Council issue directives for the approximation of such domestic acts that directly affect the establishment or functioning of the common market. Article 308 says that the Council may take appropriate measures if it is necessary to attain one of objectives of the Community and the Treaty has not ensured necessary powers in another way. These rules are framed in a very general language.

On the other hand, the European Court of Justice has interpreted the legislative power of the Community institutions broadly. Even „[t]his approach to Treaty interpretation has itself been complemented by the implied-powers doctrine, under which the Commission has been held impliedly to have the powers which are the necessary to enable it to carry out the tasks expressly conferred on it by the Treaty.”⁷¹

This ground is mostly raised by the applicants in procedures initiated under Article 230. It is not characteristic of the preliminary ruling procedure or of the plea of illegality.⁷²

4. Misuse of power

The concept of misuse of powers covers cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it,⁷³ or the contested act has been taken for purposes other than those stated.⁷⁴ Measures being taken in misusing powers are invalid and the Court quashes them or declares them invalid.⁷⁵

The concept of misuse of powers is based on the French legal concept „*détournement de pouvoir*”, but the various systems of public law alike have similar

⁷⁰ CRAIG, P. – DE BÚRCA, G.: *EU Law*, Oxford 1998. p. 502.

⁷¹ *Ibid.*

⁷² SHAW, J.: *Law of the European Union*. Basingstoke 2000. p. 522., but see eg. C-408/95. Eurotunnel SA and others v SeaFrance. [1997] ECR I-6315. paras. 40–63., C-13-16/92. Driessen en Zonen, A. Molewijk, Motorschiff Sayonara Basel AG and vof Fa. C. Mourik en Zoon v Minister van Verkeer en Waterstaat. [1993] ECR I-4751. paras. 21–26.

⁷³ Pl. 817/79. Roger Buyl and others v Commission. [1982] ECR 0245. par. 28., T-46/89. Antonino Pitrone v Commission. [1990] ECR II-0577. par. 70., T-108/89. Hans Scheuer v Commission. [1990] ECR II-411. par. 49., T-146/89. Calvin Williams v Court of Auditors. [1991] ECR II-1293. par. 87.

⁷⁴ T-521/93. Atlanta AG, Atlanta Handelsgesellschaft Harder & Co. GmbH, Afrikanische Frucht-Compagnie GmbH, Cobana Bananeneinkaufsgesellschaft mbH & Co. KG, Edeka Fruchtkontor GmbH, International Fruchthandels-Gesellschaft Weichert & Co. and Pacific Fruchtkontor GmbH v Council and Commission. [1996] ECR II-1707. par. 81., C-323/88. SA Sermes v Directeur des services des douanes de Strasbourg. [1990] ECR I-3027. par. 33., T-46/89. Antonino Pitrone v Commission. [1990] ECR II-0577. par. 71., T-108/89. Hans Scheuer v Commission [1990] ECR II-411. par. 50., T-146/89. Calvin Williams v Court of Auditors. [1991] ECR II-1293. par. 88.

⁷⁵ 59/80 and 129/80. Mariette Turner, née Krecké v Commission. [1981] ECR 1883. par. 71., 351/85. and 360/85. Fabrique de fer de Charleroi SA and Dillinger Hüttenwerke AG v Commission. [1987] ECR 3639. par. 22., 136/77. A. Racke v Hauptzollamt Mainz. [1978] ECR 1245. par. 4., 216/82. Universität Hamburg v Hauptzollamt Hamburg-Kehrwieder. [1983] ECR 2771. par. 14., C-354/95. The Queen v Minister for Agriculture, Fisheries and Food, ex parte, National Farmers' Union and others. [1997] ECR I-4559. par. 50.

institutions.⁷⁶ However, this ground is rarely used in the practice of the Community courts.⁷⁷ It seems to be very hard to prove any allegation relating to misuse of powers. Sometimes applicants make it. One of the most famous case in this respect is the one of *Giuffrida v. Council*.⁷⁸

The applicant was an official of the Council. He contested a decision of the Council by which another official had been appointed to a vacant post following an internal competition. He alleged that the competition had been organized for the sole purpose of appointing to the post the candidate who was successful in the competition. His allegations were confirmed by the fact that the Council laid down too specific conditions for the admission to the competition, which corresponded to the qualifications of the successful candidate. The Court concluded that the decision containing the appointment involved a misuse of powers and annulled it.⁷⁹

5. Other grounds of invalidity

The Court does not always trace the grounds of invalidity back to Article 230. Sometimes, it would not be easy because the grounds expressly articulated in that provision frequently overlap each other. Eg. lack of competence, as a ground of invalidity often amounts to the breach of the provision of a founding treaty.

One can notice some defects of Community legislation which have provided ground for the Court to examine the existence of these aspects and declare a measure void without including them in the categories set out by Article 230. Those defects detected mainly in the cases of individualized decisions have been as follows: lack of legal basis,⁸⁰ manifest error in fact or law,⁸¹ the legislative body manifestly exceeds the limits of its discretion,⁸² arbitrariness.⁸³

It is disputable whether these defects are separate grounds from the ones laid down in Article 230, because they can theoretically fit into the content of this provision of the Treaty without much difficulty. However, the Court has not invoked Article 230 examining the existence of these failures. The Court seems sometimes not to consider these defects in the framework of Article 230 when the Treaty leaves the Community authority a wide discretionary power in the matter. Even in these cases there are two basic principles concerning the review of lawfulness of the measure: the legality of a measure challenged by the applicant must be assessed by the Court in the light of the facts and the applicable legal rules as they stood at the time when the measure was

⁷⁶ SHAW, J.: *Law of the European Union*. Basingstoke 2000. p. 523.

⁷⁷ But see eg. 58/85. *Ethicon GmbH v Hauptzollamt Itzehoe*. [1986] ECR I131. paras. 18-21., C-323/88 *SA Serres v Directeur des services des douanes de Strasbourg*. [1990] ECR I-3027. paras. 32-36.

⁷⁸ 105/75. *Franco Giuffrida v Council*. [1976] ECR I395.

⁷⁹ *Ibid.* par. 18.

⁸⁰ Though, the Court of Justice takes it as breach of the Treaty: C-172/89. *Vandemoortele NV v Commission*. [1990] ECR I-4677. paras. 8-14.

⁸¹ 136/77. *A. Racke v Hauptzollamt Mainz*. [1978] ECR I245. par. 4., 216/82. *Universität Hamburg v Hauptzollamt Hamburg-Kehrwieder*. [1983] ECR I271. par. 14., C-354/95. *The Queen v Minister for Agriculture, Fisheries and Food, ex parte, National Farmers' Union and others*. [1997] ECR I-4559. par. 50.

⁸² 136/77. *A. Racke v Hauptzollamt Mainz*. [1978] ECR I245. par. 4., C-354/95. *The Queen v Minister for Agriculture, Fisheries and Food, ex parte, National Farmers' Union and others*. [1997] ECR I-4559. par. 50.

⁸³ 58/85. *Ethicon GmbH v Hauptzollamt Itzehoe*. [1986] ECR I131. par. 18.

adopted,⁸⁴ and the legality of a decision must be assessed by the Court on the basis of the information available to the authority when the measure was adopted.⁸⁵

BLUTMAN LÁSZLÓ

KÖZÖSSÉGI AKTUSOK: ÉRVÉNYTELENSÉGI OKOK

(Összefoglaló)

A közösségi jogrendben több eljárás létezik, melyben a közösségi bíróságok a közösségi jogi aktusok érvénytelenségét megállapíthatják. Ezen eljárásokban lényeges kérdés, hogy milyen okok alapján, milyen feltételek mellett bizonyulhat egy közösségi jogi norma érvénytelennek. A tanulmány azt elemzi, hogy a közösségi szervek jogi aktusainak érvénytelenségéhez milyen okok vezethetnek. Az EK-Szerződés 230. cikke ezen okokat nevesíti a megsemmisítési eljárással összefüggésben. Az Európai Bíróság láthatóan ugyanezen okokat teszi meg a vizsgálat alapjává más eljárásokban is.

A 230. cikk által nevesített okok a következők: a hatáskör hiánya, a lényeges eljárási szabályok megsértése, a szerződés vagy az alkalmazására vonatkozó szabályok megsértése, a hatalommal való visszaélés. A munka egyenként megvizsgálja ezen okokat a közösségi bíróságok esetjogának tükrében, és megpróbálja feltérképezni, hogy az egyes érvénytelenségi okok fennállása milyen körülmények között állapítható meg. Rámutat egyben arra is, hogy egyes esetekben az Európai Bíróság az érvénytelenséget nem vezeti közvetlenül vissza az EK-Szerződés által nevesített okokra, azonban szerződéstől független érvénytelenségi okokról aligha beszélhetünk.

⁸⁴ 15-16/76. *France v Commission*. [1979] ECR 0321. par. 7., T-371/94 and T-394/94. *British Airways plc, Scandinavian Airlines System Denmark-Norway-Sweden, Koninklijke Luchtvaart Maatschappij NV, Air UK Ltd, Euralair international, TAT European Airlines SA and British Midland Airways Ltd v Commission*. [1998] ECR II-2405. par. 81., T-115/94. *Opel Austria GmbH v Council*. [1997] ECR II-0039. par. 87.

⁸⁵ C-241/94 *France v Commission*. [1996] ECR I-4551, par. 33., T-371/94 and T-394/94. *British Airways plc, Scandinavian Airlines System Denmark-Norway-Sweden, Koninklijke Luchtvaart Maatschappij NV, Air UK Ltd, Euralair international, TAT European Airlines SA and British Midland Airways Ltd v Commission*. [1998] ECR II-2405. par. 81.

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